June 20, 2016

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington DC 20554

Re: Notice of *Ex Parte* Communication, MB Docket Nos. 15-216, 10-71

Dear Ms. Dortch:

On June 16, Rick Kaplan, Jerianne Timmerman, Erin Dozier and Benjamin Ivins of NAB met with Jonathan Sallet, David Gossett, Susan Aaron and Royce Sherlock of the Office of General Counsel to discuss statutory authority questions raised by certain proposals in the above-captioned proceedings regarding retransmission consent. We reemphasized many of the points made in our previous submissions about the FCC's lack of authority to adopt pay TV industry proposals contrary to the Copyright Act of 1976, or entailing the forced carriage of broadcast signals contrary to the Communications Act of 1934 (Act).

NAB addressed the pay TV industry's claim that the Commission has authority under Section 325(b)(3)(C)[1] to force a broadcaster that previously offered copyrighted TV programming online to continue providing that programming to benefit an MVPD's subscription broadband service during a retransmission consent dispute with that MVPD. We referred to our earlier filings explaining in detail that such a requirement would violate copyright owners' exclusive rights in their programming, under Section 106 of the Copyright Act, and that the FCC lacks authority under the Communications Act to impose such a requirement.[2]

More specifically, we explained that Section 106 reserves to the copyright owner the exclusive right to authorize, or to refuse to authorize, others from publicly performing its works,[3] and

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[1] 47 U.S.C. § 325(b)(3)(C) directs the FCC to adopt rules requiring broadcasters and multichannel video programming distributors (MVPDs) to negotiate retransmission consent in good faith. Congress first adopted a good faith requirement in satellite TV legislation in 1999, and the FCC adopted good faith rules the following year. First Report and Order, 15 FCC Rcd 5445 (2000) (Good Faith Order).

[2] *See* Written *Ex Parte* Communication of NAB, MB Docket Nos. 15-216, 10-71 (Apr. 26, 2016) (NAB Copyright *Ex Parte*); Comments of NAB, MB Docket No. 15-216, at 36-39 (Dec. 1, 2015) (NAB 2015 Comments); Reply Comments of NAB, MB Docket No. 15-216, at 41-44 (Jan. 14, 2016) (NAB 2016 Reply Comments).

[3] *See* 17 U.S.C. § 106; NAB Copyright *Ex Parte* at 2; NAB 2015 Comments at 36-37.

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that the Supreme Court has recognized the right of a copyright owner to refuse access to a work for any reason or for no reason at all.[4] In essence, MVPDs are arguing that the Commission, in the name of negotiating retransmission consent in good faith, should create a *de facto* compulsory copyright license, but, as NAB discussed in prior submissions, only Congress has authority to establish a new compulsory license.[5] Because forcing a broadcaster to continue providing access to its copyrighted programming free online to the benefit of an MVPD's subscription broadband service during a retransmission consent impasse would be contrary to the Copyright Act, the Commission lacks authority to adopt the pay TV industry's proposed requirement.[6]

Even setting aside the inconsistency of the pay TV industry's proposal with copyright law, MVPDs have failed to confront the fundamental question of how the FCC can stretch its narrow good faith authority to regulate broadcast stations' copyrighted content generally and their online offerings specifically. We explained that the FCC's limited authority pertaining to negotiations for MVPD retransmission of broadcast stations' over-the-air signals gives the agency no authority to regulate broadcasters' distribution of copyrighted content via the Internet. In establishing the retransmission consent regime, Congress made clear that stations' rights to "consent or withhold consent for the retransmission of the broadcast signal" were separate and distinct from the rights of "copyright holders in the programming contained in the signal,"[7] and even the pay TV industry has recognized this basic distinction.[8] Moreover, the FCC's authority over broadcasters and their over-the-air signals does not extend to regulation of broadcasters' non-broadcast services and offerings, including whatever services a broadcaster may or may not provide online and the terms upon which broadcasters may choose to offer any online content.[9]

In short, the Commission cannot presume, as MVPDs urge, that it can regulate online content simply because that content is distributed via the Internet by an entity that also happens to be a broadcaster who at times engages in retransmission consent negotiations. The FCC's limited authority to ensure that TV stations and MVPDs negotiate in good faith for the retransmission of broadcast signals cannot stretch that far.[10]

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[4] *See Steward v. Abend*, 495 U.S. 207, 228-229 (1990).

[5] *See* NAB Copyright *Ex Parte* at 2-3 & n.7.

[6] *See* NAB Copyright *Ex Parte* at 7-8; NAB 2016 Reply Comments at 42-43 (explaining that the FCC cannot ignore or override copyright law to adopt MVPDs' proposals).

[7] S. Rep. No. 92, 102nd Cong., 1st Sess. at 36; *see also* 47 U.S.C. § 325(b)(6).

[8] *See* Comments of the American Television Alliance, MB Docket No. 15-216, at 4 n.11 (Dec. 1, 2015) (citing both Senate Report 102-92 and 47 U.S.C. § 325(b)(6), and stating that the "legal rights given by retransmission consent (with respect to the broadcast signal) are distinct from those given by copyright law (with respect to the works contained within that signal)").

[9] *See* NAB Copyright *Ex Parte* at 7-8; NAB 2016 Reply Comments at 43.

[10] We additionally noted that the pay TV industry's invitation to the FCC to exceed its statutory authority and inappropriately delve into copyright law should be avoided for wholly practical reasons as well. The entire issue of access to online content during retransmission consent impasses is increasingly irrelevant, given the

NAB also briefly reiterated that the FCC correctly concluded, based upon the explicit language of Section 325(b)(1)(A) and relevant legislative history, that it lacks authority to order the retransmission of a station's signal in the absence of a broadcaster's consent.[11] In numerous prior submissions, we explained that the language of Section 325(b)(1)(A) is unambiguous, unequivocal and mandatory, and expresses Congress' clear intent to give broadcasters – not MVPDs, not the FCC and not any other third party – control over the retransmission of station signals.[12] Not only does Section 325(b)(1)(A) unequivocally state that broadcasters must give their "express authority" before any MVPD may retransmit their signals, the entire regime established by Congress is called retransmission *consent*.[13] Starting with the assumption that "Congress said what it meant" in Section 325(b)(1)(A),[14] any reviewing court would conclude that FCC regulations adopting MVPD proposals for "interim" (*i.e.*, forced) carriage are contrary to the unambiguously expressed intent of Congress, and thus invalid under the first step of the standard *Chevron* review.[15]

A closer examination of Section 325(b)(1) further demonstrates that Congress did not empower the Commission to permit MVPD retransmission of broadcast signals without consent. We pointed out that in Section 325(b)(1), Congress unequivocally prohibited all MVPDs from "retransmit[ting] the signal of a broadcasting station, or any part thereof, except" with the express authority of the originating station or in the cases of stations electing

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infrequency with which this issue arises and the movement of broadcasters to place more of their online content behind pay walls.

[11] Good Faith Order, 15 FCC Rcd at 5471; *Notice of Proposed Rulemaking*, 26 FCC Rcd 2718, 2727-28 (2011) (2011 Notice). 47 U.S.C. § 325(b)(1)(A) provides that no MVPD shall retransmit a broadcast station's signal except "with the express authority of the originating station."

[12] *See, e.g.*, Written *Ex Parte* Communication of NAB, MB Docket Nos. 15-216 and 10-71 (Mar. 17, 2016) (NAB March *Ex Parte*); NAB 2016 Reply Comments at 49-56; Reply Comments of NAB, MB Docket No. 10-17, at 20-29 (June 27, 2011) (2011 Retrans Replies); Comments of NAB, MB Docket No. 10-71, at 17-22 (May 27, 2011); Reply Comments of the Broadcaster Assn's, MB Docket No. 10-71, at 2-7 (June 3, 2010); Opposition of the Broadcaster Assn's, MB Docket No. 10-17, at 62-78 (May 18, 2010).

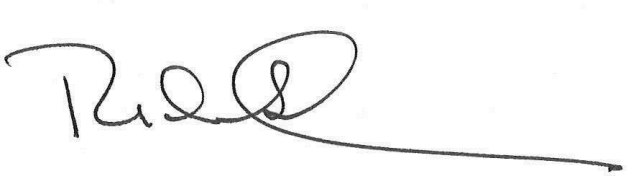
[13] Section 325(b) is entitled "Consent to retransmission of broadcasting station signals." According to Merriam-Webster, "consent" means "to agree to do or allow something, to give permission for something to happen or be done"; "to give assent or approval." Thus, broadcasters must agree to allow, or give permission or assent to, MVPDs to retransmit their signals, rather than being forced or coerced by the FCC or any other party into allowing the retransmission. The FCC recognized that consent means voluntary assent when it found that requiring mandatory arbitration for retransmission consent disputes violated the Administrative Dispute Resolution Act, which authorizes agencies to use arbitration "whenever all parties consent." 2011 Notice, 26 FCC Rcd at 2729.

[14] *U.S. v. Labonte*, 520 U.S. 751, 757 (1997). In determining whether regulations accurately reflect Congress' intent as expressed in a statute, a reviewing court does "not start from the premise that [the statutory] language is imprecise," but instead assumes that in drafting legislation, Congress says what it means, giving the words used their ordinary meaning. *Id*. *Accord, e.g.*, *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

[15] *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984); *see* NAB March *Ex Parte* at 3-4; 17-20. We again noted that Section 325(b)(3)(A) does not provide the FCC authority to adopt rules permitting MVPDs to retransmit broadcast signals without stations' consent. It is absurd to contend that Congress specifically enacted an unqualified right for broadcasters to control their signals in Section 325(b)(1)(A), and then turned around and granted the FCC power in Section 325(b)(3)(A) to undo its legislative enactment through the adoption of implementing regulations. *See* NAB March *Ex Parte* at 11; 2011 Retrans Replies at 20-23. An agency's "rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute." *Bd. of Gov. of Fed. Res. Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986).

mandatory carriage under Section 534 or Section 338 of the Communications Act.[16] Congress provided for no other exceptions from the general prohibition against MVPD retransmission of broadcast signals, and the FCC lacks authority to rewrite Section 325(b)(1) by creating additional ones.[17] The Supreme Court has made clear that "where," as here, "Congress explicitly enumerates certain exceptions to a general prohibition" in a statute, the Commission may not imply "additional exceptions."[18] Because regulations inconsistent with the statute under which they are promulgated are invalid,[19] a reviewing court will strike down any regulation entailing the forced carriage of broadcast signals.

Respectfully submitted,



Rick Kaplan
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cc: Jonathan Sallet, David Gossett, Susan Aaron, Royce Sherlock

[16] 47 U.S.C. § 325(b)(1)(A), (B) & (C).

[17] "[O]nly Congress can rewrite" the Communications Act. *La. Pub. Service Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

[18] *Hillman v. Maretta*, 133 S. Ct. 1943, 1953 (2013), quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980). The courts also have made clear that an agency lacks authority to create exceptions in addition to those set out in a statute, even though Congress did not expressly state that the exceptions included in the statute are the only ones permitted. *See So. Cal. Edison Co. v. FERC*, 195 F.3d 17, 24 (D.C. Cir. 1999) (rejecting FERC's interpretation of a statute that would have the "effect of requiring Congress to state expressly that the exceptions" set out in a statute "define the universe" of exceptions). *See also* NAB March *Ex Parte* at 9-11.

[19] *U.S. v. Larionoff*, 431 U.S. 864, 873 (1977); *see also Dixon v. U.S.*, 381 U.S. 68, 74 (1965) (an agency regulation "out of harmony with the statute" is a "nullity").